

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 357 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE R.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

NARSANG JETHABHAI

Versus

UDESANG HARIBHAI

Appearance:

MR JC SHETH for Petitioners

MR A. HAMEED KURESHI for Respondent No. 1

CORAM : MR.JUSTICE R.A.MEHTA

Date of decision: 23/12/96

ORAL JUDGEMENT :

One Jagmal had the suit land and he had two sons, namely, Haribhai Jagmal and Jethabhai Jagmal. The land was mortgaged in the year 1940 and in the proceedings under Bombay Agricultural Debtors Relief Act (hereinafter referred to as "BADR Act" for brevity) an award was passed for redemption of mortgage, by payment of instalments of Rs.132/- per year. The debtors in the

BADR proceedings were Haribhai, s/o Jagmal and Bai Diwali, widow of Jethabhai Jagmal, the other son of Jagmal. On payment of the amounts to the mortgagee the land was redeemed. At that time the sons of Diwaliben were minors. The redemption award was passed in the year 1950.

2. Udaysinh, s/o Haribhai, original plaintiff claiming that he is the sole owner and in exclusive possession of the land and that the defendants nos.1 and 2 Narsang Jethabhai and Bhagwandas Jethabhai, sons of Diwaliben and Jethabhai were illegally trying to obstruct and enter into the possession of the suit land, survey no.799, admeasuring 1 acre 32 gunthas in the sim of village Kareli, district Bharuch. It was the case that he had paid the entire redemption amount and he has been the exclusive owner and in exclusive possession of the entire land. That the defendants had no legal right to enter the land. Therefore, he filed a suit for injunction. The suit has been decreed by both the courts below. The original defendants have filed the present Second Appeal before this Court.

3. At the time of admission of the Second Appeal, the following questions have been certified as substantial questions of law :

"1. Whether while holding that the plaintiff has proved his title, the decision of a tenancy Court in proceedings to which defendant was not a party could have been taken into account?

2. If the decision of the tenancy court is excluded from consideration what is its effect on the decree passed by the court below?"

4. Though the question proceeds on the footing that the plaintiff has proved his title, on going through the judgment of the lower appellate court it becomes clear that the lower appellate court has not found that the plaintiff has proved his title. On the contrary the lower appellate court has found that not only there was an award for redemption of the mortgage in favour of the plaintiff Udesang Haribhai and Diwaliben, but also that Diwaliben has also paid instalments separately and separate receipts were issued to her and payment of instalments made by Diwaliben were held to be proved and the learned Appellate Judge held that :

"I believe that the instalments at the rate of Rs.66/- must have been paid from, S.Y.2009 to 2019, i.e. from 1953 to 1963, formerly by Bai Diwali and thereafter by the present defendants to Jethabhai Manorbhai and thereafter to his wife and son and the witness Chaturbhai and I also believe that in token of the same, they had given receipts under their signatures in the Note Book produced by the defendants and I further believe that the entries marked at Ex.156 to 166 are genuine, I incline to believe this piece of evidence because it gets corroboration by the Award which was passed in the 1950. As we saw that in that Award Bai Diwali was ordered to pay her instalment at the rate of Rs.66/- per year to Jethabhai Manorbhai. It is for this reasonable belief that Bai Diwali must have shared the consideration which was to be given to Jethabhai Manorbhai. It is true that the plaintiff has stated that used to pay even the amount which was required to pay by Bai Diwali. But I must say that the plaintiff has not produced any documentary proof to support his contention. If at all, the plaintiff had lost his personal diary, wherein it is said that he posted the entries about the said payment, then he could have examined Arvindbhai, the son of Jethabhai Manorbhai to support his that contention. But it seems that he had not taken that risk. For this reason also that I believe the entries produced at Exs.156 to 166 and hold that Bai Diwali and the defendants must have shared the consideration which was to be paid to Juthbhai Manorbhai. But the said circumstance does not help the defendants in the present litigation. Because in the present litigation the crucial point that is to who is in actual possession of the suit land. In my view if the defendants think that they are the co-owners of the suit land then it will be open for them to start the new litigation to obtain their share in the suit land. But when it is proved conclusively that the plaintiff is in possession of entire land since many years and when it is further proved that even the decision given in the Tenancy Proceedings support the plaintiffs possession for the suit land, then in my view, the defendants cannot be given any remedy in this litigation."

5. It is, thus, clear that the lower appellate court

has held that not only the plaintiff had failed to prove his title but the defendants have proved their title.

6. The lower appellate court confirmed the decree for injunction only on the ground that the plaintiff was in exclusive possession of the suit land on the date of the suit. For that purpose he has relied upon the decision given in the Tenancy proceedings. Therefore, the crucial question is the second question, i.e. whether that decision in which the defendants were not parties could have been decisive and conclusive. The lower appellate court has referred to 'Shedha' demarcating the suit land in two parts. The plaintiff denied that there was any such division or physical feature of demarcation, but it is noticed in the map and report of the Commissioner appointed at the instance of the plaintiff. In view of this evidence it was necessary for the plaintiff to prove by reliable and cogent evidence to show that the defendants were not in possession and were not entitled to enter the suit land. The plaintiff (uncle) in order to claim the whole land and grab it against the interest of his minor nephews, has even gone to the extent of denying that there was mortgage by his father and Diwaliben. He even denied that possession was given to Diwaliben and himself. He also denied that Diwaliben had paid any payment of instalments and he claimed that all the instalments have been paid by him alone. All these things are falsified and held against the plaintiff (uncle). Therefore, his evidence and his word are totally unreliable. He has also stated that there was no demarcation and no hedge between the lands. However, the Commissioner's report shows that there was 'Shedha' (boundary) within the suit land. The evidence of the defendants and their witnesses has been disbelieved only on the ground that in tenancy proceedings to which the defendants were not parties, the plaintiff had been shown to be in possession. As far as tenancy proceedings are concerned, these defendants had not been joined in that proceeding, therefore, it cannot be said that all these persons were not in possession of the land and were not entitled to the land and were not entitled to enter the land. Even if the plaintiff was in possession, it is on behalf of all co-owners and he cannot restrain other co-owners from entering and enjoying the land.

7. In view of the aforesaid discussion it is clear that the plaintiff has failed to prove :

- (i) that he was in exclusive legal possession
of the suit land on the date of the

suit; and

(ii) that the defendants had no right to enter
the suit land.

Hence the suit of the plaintiff ought to have been
dismissed and is so dismissed with costs through out.
The Second Appeal is, therefore, allowed with costs
through out.

23rd Dec. 1996 (R.A. Mehta, J.)

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